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9 **UNITED STATES DISTRICT COURT**

10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

11 **SAN FRANCISCO DIVISION**

12 PENTALPHA MACAU COMMERCIAL
13 OFFSHORE LIMITED, a Macau, PRC
14 corporation,

15 Plaintiff,

16 vs.

17 DAMODER REDDY, an individual; and DOES
18 1 through 10 inclusive,

19 Defendants.

20

DAMODER REDDY, an individual,

21 Counterclaimant,

22 vs.

23 PENTALPHA MACAU COMMERCIAL
24 OFFSHORE LIMITED, a Macau, PRC
25 corporation, et al.

26 Counterdefendants

27) CASE NO.: 03-5914 MMC (EDL)
28) ORDER ON
29) ~~JOINT EX PARTE~~ APPLICATION OF
30) PENTALPHA MACAU COMMERCIAL
31) OFFSHORE LIMITED AND GARY RHEA FOR
32) AN ORDER FOR MENTAL EXAMINATION OF
33) DAMODER REDDY PURSUANT TO RULE 35

34)
35 Date: none set
36 Time: none set
37 Hon. Elizabeth D. LaPorte

INTRODUCTION

2 Counterdefendants Pentalpha Macau Commercial Offshore Limited and Gary Rhea jointly
3 request an Order from this Court pursuant to Fed. R. Civ. P. 35(a) for a mental examination by Dr.
4 Randall B. Smith, a clinical psychologist, on October 18, 2005 at 9:30 a.m. at his office at 1375
5 Sutter Street, Suite 304, San Francisco, CA. Dr. Smith has a very busy practice, and books
6 appointments months in advance. His *curriculum vitae* is attached hereto. Because of the discovery
7 cut-off on December 12, 2005 and the upcoming February 2006 trial date, Dr. Smith has held open a
8 date of October 18, 2005 for Mr. Reddy's examination. Because of the need to hold the October 18
9 date and the lack of any real argument (as shown by the allegations in Reddy's Third Amended
10 Counterclaim) that the parties are *not* entitled to a Rule 35(a) examination, Pentalpha and Mr. Rhea
11 are requesting the order by *ex parte* application, or in the alternative, on a shortened briefing
12 schedule if the Court believes that an Order Shortening Time is more appropriate.

STATEMENT OF FACTS

14 A. The Allegations In the Third Amended Counterclaim Justifying A Mental Examination.

15 Reddy's operative pleading in this case is his Third Amended Counterclaim ("TAC").¹ The
16 Fifth Cause of Action in the Third Amended Counterclaim is a claim for "intentional infliction of
17 emotional distress." See TAC, ¶¶ 35-39. In his emotional distress claim, Reddy contends that he has
18 suffered "severe emotional distress causing him lost income, depression, [and] anxiety. . . in the
19 amount of \$1 million." TAC, ¶ 35. As a result of the acts of among others, Pentalpha and Mr. Rhea,
20 Reddy alleges that he "has suffered and continues to suffer humiliation, mental anguish, and
21 emotional and physical distress, loss of income and has been injured in mind and body in an amount
22 of \$2 million." TAC, ¶ 37. Reddy also alleges that his "emotional injuries include anxiety, phobias,
23 and fear of harassment and verbal abuse." *Id.* Reddy further alleges that his emotional distress has
24 "prevented [him] from attending to his usual occupation" and he is therefore seeking additional
25 damages for lost income and benefits." TAC, ¶ 38.

²⁷ 1 Pentalpha and Mr. Rhea request that this Court take judicial notice of Reddy's Third
²⁸ Amended Counterclaim.

In addition to those express allegations claiming severe mental injury – severe enough to cause physical injury, ongoing anxiety disorder and ongoing phobias and millions in damages – Reddy has also claimed in his Breach of Fiduciary Duty cause of action that as a result of the acts of among others, Pentalpha and Mr. Rhea, Reddy has suffered “severe emotional distress, depression, anxiety, etc. and has incurred and continues to incur medical costs” TAC, ¶ 32. See also, ¶¶ 12 (alleging \$2 million in emotional damages), 17 (alleging \$3 million in emotional damages) and 27 (alleging \$500,000 in emotional damages), all containing the same allegation. Thus, Reddy has clearly and unequivocally interjected his mental injuries into this case.

Pentalpha's Efforts To Confer With Reddy's Counsel.

Pentalpha's counsel discussed the issue of a mental examination of Mr. Reddy on several occasions and specifically conferred on the issue on September 2. At that time, Pentalpha's counsel requested that Reddy submit to a Rule 35(a) examination and identified the reasons that supported the need for the examination. Reddy's counsel agreed that Reddy's mental injuries were at issue in the case. Stillman Declaration, ¶ 2. Although I had asked Reddy's counsel to provide me with dates for the examination, he did not do so. *Id.* Accordingly, on September 9, Pentalpha's counsel requested that Reddy stipulate to a Rule 35(a) Order and gave notice to Reddy's counsel that Pentalpha would file an *ex parte* Application for the Order if he failed to respond. Stillman Decl., ¶ 3. Reddy's counsel has not responded to that request.

ARGUMENT

1.

PENTALPHA AND RHEA ARE ENTITLED TO AN ORDER FOR A MENTAL EXAMINATION

Rule 35(a) requires that a party seeking a mental examination of another party must first seek an order for the examination, which sets forth the date, time, place and scope of the examination. Rule 35(a) has two requirements: (1) that the mental condition of the party be "in controversy" and (2) good cause. The "in controversy" and "good cause" requirements are "necessarily related." *Schlagenhauf v. Holder*, 379 U.S. 104, 118-19, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964). There is no *bona fide* argument that Reddy has not put his mental state "in controversy" and that "good cause" has not been shown by Pentalpha and Mr. Rhea.

1 A. Reddy Has Placed His Mental Condition In Controversy.

2 As set forth in the Third Amended Complaint, Reddy has clearly put his mental condition in
 3 controversy in this case. First, he has alleged a claim for "intentional infliction of emotional distress."
 4 That alone is often sufficient to put a plaintiff's mental condition in controversy. *Turner v. Imperial*
 5 *Stores*, 161 F.R.D. 89, 95 (S.D. Cal. 1995) (courts generally order mental examination when claim
 6 involves cause of action for infliction of emotional distress). *Lahr v. Fulbright & Jaworski, LLP*, 164
 7 F.R.D. 196, 199 (N.D. Tex. 1995) ("although the cases analyzing [the 'in controversy'] requirement
 8 fail to provide a definitive test for deciding the issue, a distinction between the cases has emerged in
 9 favor of an examination when a plaintiff has alleged a separate tort claim for emotional distress").
 10 Reddy could not be clearer in alleging that he is suffering from ongoing psychiatric illness, including
 11 depression, anxiety and phobias that he claims were so severe as to cause physical injury, require
 12 him to miss work and cause him a not insignificant \$3 million in damages. Therefore, he has put his
 13 mental condition "in controversy." *Duncan v. Upjohn Co.*, 155 F.R.D. 23, 25 (D. Conn. 1994) ("By
 14 claiming ongoing psychiatric harm . . . the plaintiff has placed his mental state in controversy, which
 15 in turn constitutes good cause for ordering a psychiatric examination...").

16 In addition to the inclusion of an "infliction of mental distress" cause of action – which itself
 17 should be dispositive – other courts have held that the identical allegations in other parts of Reddy's
 18 counterclaim have themselves warranted a psychiatric examination. For example, in *Gattegno v.*
 19 *Pricewaterhousecoopers, LLP*, 204 F.R.D. 228, 231 (D.Conn. 2001), the plaintiff alleged that she
 20 "continues to suffer . . . mental anguish, physical and emotional distress, humiliation and
 21 embarrassment." The court held that "This claim of ongoing mental injury also places the plaintiff's
 22 mental state "in controversy.'" *Id.* Similarly, it is clear that Reddy must present evidence of his
 23 "emotional distress" in support of his claims. In *Smedley v Capps, Staples, Ward, Hastings &*
 24 *Dodson*, 820 F. Supp. 1227, 1232 (N.D. Cal 1993), the court compelled the plaintiff to undergo a
 25 psychiatric evaluation because the plaintiff intended "to present evidence of 'normal' emotional
 26 distress." Accordingly, Reddy has placed his past and present mental condition directly at issue.

27 B. Pentalpha And Mr. Rhea Have Demonstrated "Good Cause."

28 The phrase "good cause" has been held to impose a requirement that the moving party

1 "present sufficient information so that the district judge can fulfill his function mandated by the Rule
2 [35(a)]." *Schlagenhauf*, 379 U.S. at 119. The Supreme Court held that there are times when "the
3 pleadings alone are sufficient to meet these requirements. A plaintiff in a negligence action who
4 asserts mental or physical injury . . . places that mental or physical injury clearly in controversy and
5 provides the defendant with good cause for an examination to determine the existence and extent of
6 such asserted injury." *Id.* As fully discussed above, Reddy's allegations in his Third Amended
7 Counterclaim clearly and unequivocally put his mental state at issue and constitute the "good cause"
8 discussed by the Supreme Court.

9 C. Dr. Smith Is A Qualified Examiner.

10 As shown by his *curriculum vitae*, Dr. Smith is a licensed psychologist with the State of
11 California and is a Qualified Medical Examiner. He has extensive experience in emotional distress
12 claims and has reserved October 18, 2005 at 9:30 a.m. at his office for a face to face interview
13 (including a personal history) and testing with Mr. Reddy, including giving Reddy several
14 psychological tests designed to gauge his emotional distress claim. Dr. Smith believes that the
15 interview and testing will take a full day. The scope of the examination will be limited to those
16 matters relating to Reddy's complaints in his Third Amended Counterclaim, a psychological history
17 and psychological testing regarding Reddy's mental condition.

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CONCLUSION

For the foregoing reasons, Pentalpha and Mr. Rhea respectfully request that their *ex parte* Application be granted and the Court enter an Order compelling the psychiatric examination by Dr. Smith on October 18, 2005 at 9:30 a.m. at Dr. Smith's Office. In the alternative, to the extent that this Court believes that a motion, not *ex parte* application is required in this case, Pentalpha and Mr. Rhea ask for an Order Shortening Time for their motion to be briefed and heard in order to preserve Dr. Smith's October 18th date.

Respectfully Submitted,

FLYNN & STILLMAN

Dhly J. Nell

By: _____

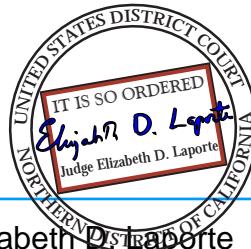
Philip H. Stillman, Esq.

Attorneys for Plaintiff and counter-defendant, PENTALPHA
MACAU COMMERCIAL OFFSHORE LIMITED and GARY
RHEA

ORDER

On receipt of this ex parte application, the Court ordered the parties to brief the matter and scheduled a hearing on the motion for October 11, 2005. On September 27, 2005, Defendant Damoder Reddy filed a statement of non-opposition to Plaintiff's Motion for a Rule 35(a) Examination. The Court therefore vacates the hearing scheduled for October 11, 2005 and grants Plaintiff's Motion for a Rule 35(a) Examination.

Dated: September 27, 2005



Elizabeth D. Baporte
U.S. Magistrate Judge